

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
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JAMES DIMARIA, :

Petitioner, :

08 Civ. 4547 (TPG)

- against - :

**OPINION**

DALE ARTUS, Superintendent of :  
Clinton Correctional Facility, :

Respondent. :  
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This is a habeas corpus petition by a state prisoner, filed under 28 U.S.C. § 2254. The court has directed that the State file a response. The New York Attorney General's office has referred the matter to the District Attorney of Bronx County.

There are two motions by petitioner which are now pending. One is for appointment of counsel. The other is to hold the petition in abeyance while petitioner exhausts his state remedies in a post-conviction motion, which is now filed in the state court.

Since petitioner has now admitted his failure to exhaust his state remedies, the petition should be dismissed on that ground. After the post-conviction remedy has been decided in the state court system, petitioner can determine whether there is any necessity or any proper ground for seeking federal court relief.

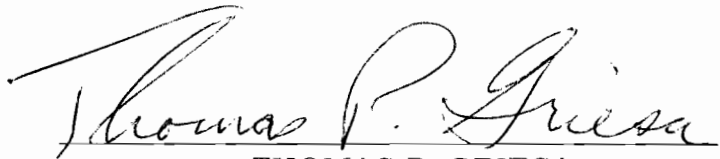
For the above reasons, the petition is denied and dismissed. The motion for appointment of counsel is denied.

As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; see Lozada v. United States, 107 F.3d 1011, 1016-17 (2d Cir. 1997), abrogated on other grounds by United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997).

In respect to the in forma pauperis statute relating to appeal (28 U.S.C. § 1915(a)), it is certified that an appeal from this order would not be taken in good faith, because it would be frivolous.

SO ORDERED.

Dated: New York, New York  
February 13, 2009

A handwritten signature in black ink, reading "Thomas P. Griesa". The signature is written in a cursive, flowing style with a large initial 'T'.

THOMAS P. GRIESA  
U.S.D.J.